NO. 432269

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

46496-9

STATE OF WASHINGTON, Respondent,

v.

NATHEN WRIGHT, Appellant,

Personal Restraint Petition

Mitch Harrison
Attorney for Appellant
Harrison Law Firm
101 Warren Avenue N
Seattle, Washington 98109
Tel (253) 335 - 2965

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I. STATUS OF PETITIONER

Nathen Wright was convicted of Vehicular Homicide, Possession of Heroin, and Use of Drug Paraphernalia. Mr. Wright is currently being held at the Cedar Creek Corrections Center in Littlerock, WA.

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

1. THE ACCIDENT

On the dark morning of Wednesday, October 27, 2010, Susan Montano-Felton was driving an empty school bus. The bus was traveling at a normal speed, about sixty miles per hour.[1] At approximately 6:23 AM, as the school bus changed lanes and slowed down to about 30 miles per hour to make a left turn, it was violently rear ended by an SUV driven by Nathan Wright,[2] who did not even have time to apply the brakes.[3] Neither Mr. Wright, nor the passenger were wearing seat belts.[4] The accident occurred about 300 feet before the intersection.[5] Kahlil Marshall, the passenger and registered owner of the SUV, died as a result of the

[1] RP 29.
[2] RP 16, 30, 34, 77.
[3] RP 313.
[4] RP 313.
[5] RP 134; 159-160; 328.

collision.[6] Wright suffered broken ribs, a broken ankle, and multiple lacerations.[7]

After the accident, the police noted that the bus driver exhibited watery and bloodshot eyes[8] and she swayed off her center axis during the horizontal gaze nystagmus test.[9]

The prosecution introduced a witness who observed the SUV Wright was driving though his rear view mirrors.[10] This witness testified that Wright had been driving "above the speed limit and swerving occasionally" prior to the collision,[11] and, at one point, the witness had to evade the SUV when it swerved into his lane.[12] The witness then testified that he saw the car hit the back of a school bus "trying to turn left in the . . . intersection."[13] The witness was roughly a quarter of a mile away when he observed the collision.[14]

However, the accuracy of this witness's testimony was cast into doubt by other disinterested witnesses. First, the bus driver testified that there was nothing out of the ordinary about Wright's driving other than the

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[6] RP 160, 267, 283-84.
[7] RP 316.
[8] RP 124.
[9] RP 126.
[10] RP 51.
[11] RP 54, 57.
[12] RP 53.
[13] RP 57.
[14] RP 57-58.

SUV's bright headlights.[15] Corroborating the bus driver's testimony, the accident investigator concluded that the SUV hit the back of the school bus in the center of the lane, indicating that Mr. Wright was driving straight in the center of the lane at the time of the collision.[16] Additionally, the accident expert testified that the collision undoubtedly occurred about 300 feet before the intersection.[17]

Due to the early hour, it was still dark—the first officer to respond on the scene had to use his flashlight to determine whether anyone was inside the SUV.[18] The first officer to arrive on the scene also testified that no odors of intoxicants were detectable.[19] Several other witnesses similarly testified that no odors of intoxicants were detectable.[20]

2. Evidence of Drug Possession

Later, the police searched the SUV and found everything inside the SUV in disarray.[21] Among the contents, the police discovered two capped, unused syringes from the driver's side floorboard.[22] The State claimed to have found something in one of the needles, however, the State told the court "we don't know what [the substance claimed to have been found] is,

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[15] RP 28.
[16] RP 164.
[17] RP 328.
[18] RP 82.
[19] RP 83.
[20] RP 71-72; 182.
[21] RP 124.
[22] RP 120.

and we really don't care what it is."[23] This assertion conflicted with the testimony from one trooper, who said that the needles were unused.[24] When asked how long the needles had been inside the SUV, a State Trooper admitted "I have no way of knowing that."[25] The same trooper also conceded that there was no way to know where the needles were located prior to impact.[26]

Beneath Ms. Marshall's body, in the center console, police found a lighter and a spoon with a small piece of cotton in the bowl.[27] Several police witnesses also admitted that there was no way to know where the spoon was located prior to impact.[28] Although the police never tested the spoon,[29] the cotton later tested positive for the presence of heroin.[30] However, the State's forensic scientist admitted that melting the heroin in the spoon could have occurred at some point in time before the accident.[31] The State failed to present any fingerprint evidence tying Mr. Wright to the spoon.[32]

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[23] RP 97.
[24] RP 177.
[25] RP 123.
[26] RP 123.
[27] RP 122, 183.
[28] RP 123; 188.
[29] RP 184.
[30] RP 171-73, 299-300.
[31] RP 304-05.
[32] RP 305.

Although Mr. Wright admitted a general awareness that drugs were in the car, the State could not tie this awareness to any particular substance.[33]

3. Evidence of Drug Use

A toxicology report revealed that Mr. Wright had no heroin in his system, but revealed that he had .05 milligrams per liter of methamphetamine in his system.[34] Sergeant Gallagher, the State's drug recognition expert, examined Mr. Wright for 30 minutes at the hospital after the accident.[35] On direct examination, Gallagher stated that Mr. Wright exhibited no signs of impairment.[36] Gallagher reported that Mr. Wright's pulse, blood pressure, body temperature, and pupil size were all at normal levels.[37]

On cross-examination, Gallagher backtracked and said that, although he was unable to form an opinion about whether Mr. Wright was intoxicated, Mr. Wright was "probably under the influence of something that caused him to be impaired."[38] On redirect, Gallagher admitted that in a pretrial interview he claimed there was nothing to cause Gallagher to

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[33] RP 314.
[34] RP 192-93, 249.
[35] RP 230.
[36] RP 227, 231.
[37] RP 230-231.
[38] RP 237.

believe that Mr. Wright was impaired.[39] Gallagher's glaringly false testimony caused an exasperated defense counsel to call Gallagher a "Piece of Shit" in front of the jury.[40]

The State's toxicologist testified about the results of Mr. Wright's blood test.[41] However, the State did not elicit any information about whether the vials contained an anticoagulant or an enzyme poison.[42] Despite this lack of foundation, Mr. Wright's defense counsel failed to object when the toxicologist testified about the results of the blood draw.[43]

The toxicologist did not find any drugs or alcohol in Mr. Wright's blood with the exception of a small amount of methamphetamine.[44] The toxicologist could not determine whether Mr. Wright could have been impaired during the time of the accident.[45] Furthermore, the toxicologist admitted that the .05 milligrams per liter of methamphetamine in Mr. Wright's blood was a small enough dose to be consistent with therapeutic use for patients with Attention Deficit Disorder, and such a dose could in fact improve concentration while driving.[46] Mr. Wright testified that he

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[39] RP 238.
[40] RP 239. Defense Counsel apologized for the remark immediately after the jury was excused from the courtroom. RP 239-40.
[41] RP 248.
[42] RP 249.
[43] RP 249.
[44] RP 249.
[45] RP 249.
[46] RP 258; 373.

had used methamphetamine in the preceding days but was not affected by any drugs at the time of the accident.[47]

B. PROCEDURAL FACTS

Mr. Wright was charged on December 8, 2011, with one count of Vehicular Homicide, one count of Unlawful Possession of Heroin, and one count of Unlawful Use of Drug Paraphernalia pursuant to RCWs 46.61.520, 69.50.4013, and 69.50.412(1) respectively.[48]

No pre-trial motions were filed nor heard regarding a CrR 4.4 motion for severance. Nor was a motion for severance made at the close of evidence. Trial commenced on February 23, 2012 in Mason County Superior Court, the Honorable Toni A. Sheldon presiding.

The State's theory of the case was that Mr. Wright was melting heroin on a spoon while driving, which caused the accident. The State pursued this theory even though there was a passenger in the SUV. This passenger had track marks on her arms from heroin use;[49] no evidence even suggested that Mr. Wright's arms had track marks.

The jury convicted Mr. Wright on all three counts, and Mr. Wright was sentenced within the standard range.[50] Mr. Wright appealed his conviction to the Washington State Court of Appeals, Division II. Division

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[47] RP 237.
[48] CP 90-91.
[49] RP 278.
[50] CP 3.

II affirmed Mr. Wright's convictions for unlawful possession of heroin, and use of drug paraphernalia. However, Division II mischaracterized count III as *possession* of drug paraphernalia rather than *use* of drug paraphernalia and failed to perform an analysis independent of the possession charge under count II.

Mr. Wright's appellate attorney failed to challenge Mr. Wright's conviction for vehicular homicide or the admission of the blood draw.

III. ARGUMENT

A. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE TO SEVER THE DRUG CHARGES FROM THE VEHICULAR HOMICIDE CHARGE.

Under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.[51] Mr. Wright received ineffective assistance of counsel, because (1) his trial attorney's performance was deficient, and (2) he was prejudiced by the deficiency.[52]

A claim of ineffective assistance of counsel presents a mixed question of fact and law and is reviewed de novo.[53] Rather than applying

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[51] *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *see also In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
[52] *Strickland,* 466 U.S. at 687.
[53] *In re Pers. Restraint of Fleming,* 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

mechanical rules to every case, the court evaluates the facts of each case in pursuit of answering one ultimate question: did defense counsel's deficient performance deny the defendant a fair trial?[54] Deficient performance is not shown by matters that go to trial "strategy" or "tactics" so long as counsel's decision to pursue that strategy was reasonable.[55]

The courts have recognized that failure to bring a motion to sever multiple counts may constitute ineffective assistance of counsel.[56] To show that such a failure was deficient, the appellant must show that the trial judge likely would have granted the motion to sever, and that there is a reasonable probability that the jury would not have found the defendant guilty as charged. [57]

1. DEFICIENT PERFORMANCE

The failure to consider or file a motion for severance may render defense counsel's representation deficient under *Strickland.* In *Sutherby*, the defendant was charged with one count of First Degree Rape of a Child, one count of First Degree Child Molestation, and ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. In a joint trial on each of those charges, the defendant was convicted as charged. On appeal, the defendant argued that his trial counsel should have moved for

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[54] *Strickland*, 466 U.S. at 696.
[55] *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).
[56] *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).
[57] *Id.*

severance of some of the charges and that the failure to do so was ineffective assistance of counsel. The Supreme Court agreed and reversed the defendant's convictions, holding that the failure to move for severance was ineffective and prejudicial under *Strickland* because there was no tactical advantage to avoid moving for severance.

The failure to consider or file a motion for severance amounts to deficient performance when two requirements are met: (1) the record shows that the trial court would have been "likely" to grant such a motion, and (2) there are no reasonable explanations for trial counsel's failure to request the motion.[58]

a) It is likely that the trial court would have severed the Vehicular Homicide charge from the remaining charges.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. However, offenses properly joined under CrR 4.3(a) may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."[59] Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.[60]

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[58] *Sutherby*, 165 Wn.2d at 884.
[59] CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).
[60] *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968).

The courts have determined that joining charges may prejudice a defendant in several ways. First, the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged.[61] Moreover, the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.[62]

In other words, severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition.[63] Courts recognize the danger even when the jury is "properly instructed to consider the crimes separately."[64]

To determine whether to sever charges to avoid prejudice to a defendant, a court considers "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the

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[61] *Bythrow* 114 Wn.2d at 718.
[62] *Id.*
[63] *Sutherby* 204 P.3d at 922 (citing *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989)).
[64] *Id.* (citing *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

admissibility of evidence of the other charges even if not joined for trial."[65]

In finding that Sutherby's counsel was ineffective, the Court first held that the trial court would likely have granted the severance motion had it been made because (1) the evidence was strong on some charges and weak on others, (2) the defendant's defenses for some counts were inconsistent with his defenses on other counts, (3) the nature of the charges and the proof of each made it difficult for the jury to consider evidence of one count separately from evidence on other counts, and (4) the evidence for each charge contained prejudicial evidence that would not likely have been admitted in the other charges.[66]

In this case, defense counsel was ineffective for failing to make a pretrial motion to sever the charges for Possession of a Controlled Substance and Use of Drug Paraphernalia from the Vehicular Homicide charge. Just as in *Sutherby*, there existed no reasonable tactical or strategic reason for defense counsel not to request severance of the charges.[67] Each of the four factors analyzed in *Sutherby* support a finding of deficiency here.

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[65] *Id.* at 923 (quoting *Russell*, 125 Wn.2d at 63).
[66] *Id.*
[67] *Sutherby*, 204 P.3d at 922.

First, the court should assess the strength of the State's case as to each count. In *Sutherby*, the State's evidence on the possession of child pornography was very strong, while the evidence pertaining to the charges of child rape and molestation were substantially weaker. The evidence consisted of the trial testimony and prior statements of the victim, who was six years old at the time of trial, and medical evidence that was consistent with abuse, but which the medical professionals acknowledged did not confirm the fact that sexual abuse occurred.[68]

Here, both the Use of Drug Paraphernalia and the Unlawful Possession of a Controlled Substance convictions were, *standing alone*, unsupported by the evidence. The State located heroin inside the vehicle Mr. Wright was driving, which alone is not sufficient evidence to prove he possessed it. However, this was stronger than the evidence supporting the Vehicular Homicide charge, which was generally weak and heavily contested.

Second, Mr. Wright mounted a very different defense to the vehicular homicide charge—a general denial—than he did to the possession charge, to which he claimed that he lacked dominion and control over the heroin, and in the alternative, the possession was

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[68] *Sutherby*, 165 Wn.2d at 885.

unwitting. Due to these inconsistent defenses, trying the two charges simultaneously confused the issue for the jury.

Third, just as in *Sutherby*, although the jury was instructed to decide each count separately,[69] the State's argument focused on a combination of the two alleged crimes. The State argued that Wright may have been driving erratically on the day of the accident because he was attempting to "shoot up" heroin during the course of driving. No evidence supported this argument. In fact, the needles were capped and unused, and no surgical bands, which are used by heroin users to tie around a limb in order to draw a vein, were recovered. In a separate trial, the State would not have been able to argue that one crime proved the other. But in a joint trial, that is exactly what the jury was able to conclude.

Finally, in two separate trials, much of the evidence of the accident and the State's arguments connecting Mr. Wright to it would have been inadmissible and improper. In a trial on solely the two drug charges, the gruesome details of the accident and the fact that the victim had died, for example, would be irrelevant for proving that he possessed those drugs and, therefore, inadmissible.

And while Mr. Wright used methamphetamine several days before the accident, he was not charged with possessing or using

[69] RP 439, Jury Instruction No. 6.

methamphetamine. He was charged with using and possessing heroin. Thus, any evidence of his prior use of methamphetamine would have been inadmissible propensity evidence.[70]

Similarly, in a trial solely dedicated to the vehicular homicide, the evidence of heroin inside of the vehicle would be inadmissible to prove that Mr. Wright was driving recklessly. Mr. Wright had no heroin in his system. Thus, he was certainly not under its influence when he crashed the vehicle. Moreover, the mere presence of heroin at the accident scene does not prove that Mr. Wright was driving recklessly. Mr. Wright never used heroin, the passenger did.

Though it is certainly possible that Mr. Wright was trying to use the heroin before he crashed, as the State argued during closing argument, this theory is pure speculation. Any number of reasons are at least equally likely under the present facts. And even if it were not speculation, the probative value of the heroine (in proving that is caused the accident) would certainly have been substantially outweighed by unfair prejudice of introducing evidence of drug use that was never actually connected the Mr. Wright beyond his mere proximity to it.[71]

If nothing else, the admissibility determination would have been a close call, and "'the scale should be tipped in favor of the defendant and

[70] ER 404 (b).
[71] ER 403.

exclusion of the evidence.'"[72] Just as in *Sutherby*, had defense counsel moved to sever the charges, the trial court would likely have granted the motion.

b) There is no reasonable explanation for defense counsel's failure to bring a pre-trial or mid-trial motion to sever.

To demonstrate deficient performance, a "defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."[73] As the *Sutherby* holding shows, when evidence is weak on one charge and the court was likely to grant the motion, the failure to do so is likely unreasonable and deficient.

The *Sutherby* court made clear that a presupposition that evidence of the possession of child pornography charge would be admitted into the trial for the child molestation charge did not make counsel's failure to request severance any more reasonable.[74] The fact remained that Sutherby stood nothing to gain from joining the charges.[75]

Mr. Wright's defense counsel either failed to consider the option of severance, or made an unreasonable decision to not move for severance. Even if the evidence of heroin inside the vehicle were admitted in a

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[72] *Smith,* 106 Wn.2d at 776, 725 P.2d 951 (quoting *State v. Bennett,* 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).
[73] *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).
[74] *Sutherby*, 165 Wn.2d at 884.
[75] *Id.*

hypothetical trial for a severed vehicular homicide charge, Mr. Wright stood nothing to gain by facing both charges in a single trial. Such a motion would only have helped Mr. Wright's defenses pertaining to each charge.

2. PREJUDICE: THERE IS A REASONABLE PROBABILITY THAT, HAD MR. WRIGHT BEEN GIVEN SEPARATE TRIALS, THE RESULT ON AT LEAST ONE OF THE COUNTS WOULD HAVE BEEN DIFFERENT.

The remaining question is prejudice. It requires "a reasonable probability that, but for defense counsel's unreasonable errors, the result of the proceeding[s] would have been different."[76] In other words, counsel's deficiencies must have adversely affected the defendant's right to a fair trial to an extent that they "undermine confidence in the outcome."[77]

Here, as in *Sutherby*, prejudice is apparent from the previous determination that prejudicial evidence would likely have been excluded from the respective trials had severance been granted. "A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity."[78] The joinder of the charges allowed the jury to use evidence of Mr. Wright's methamphetamine use to convict him of possession of

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[76] *Strickland*, 466 U.S. at 694.
[77] *Id.*; *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).
[78] *Sutherby*, 165 Wn.2d at 887.

heroin. It also allowed the jury to use evidence of heroin inside the vehicle to find Mr. Wright guilty of vehicular homicide on the basis of criminal propensity.

Mr. Wright received ineffective assistance of counsel based on his trial attorney's failure to seek severance of the charges. The failure to do so fell below an objective standard of reasonableness in light of all of the circumstances. Furthermore, there is a reasonable probability that the trial court would have granted the motion if defense counsel had requested it. If the severance had been granted, there is a reasonable probability that the outcome at a separate trial for both charges would have been different.

B. Mr. Wright's Trial Representation Fell Below an Objective Standard of Reasonableness When the Defense Counsel Failed to Object to the State Admitting the Results of the Blood Draw Without Proper Foundation.

Mr. Wright received ineffective assistance of counsel, because (1) his trial attorney's performance was deficient, and (2) he was prejudiced by the deficiency.[79]

1. Trial Counsel's Failure to Object to Admission of the Results of the Blood Draw Fell Below an Objective Standard of Reasonableness.

When a defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the

[79] *Strickland*, 466 U.S. at 687.

challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted.[80]

a) Defense counsel's failure to object to the blood draw could not have been justified by trial strategy.

The State emphatically argued that Mr. Wright was under the influence at the time of the accident. The *only* evidence insinuating that Mr. Wright was under the influence of drugs was the blood test. All of the police testified that there was no odor of alcohol on Mr. Wright or the automobile after the accident. Additionally, the needles found in the car were unused. Finally, one police officer offered wildly inconsistent testimony about whether Mr. Wright appeared intoxicated at the hospital after the incident.[81]

Although the blood draw did not show alcohol, it did show the presence of methamphetamine. The trace amount of methamphetamine in Mr. Wright's blood provided the only concrete evidence of intoxication. An objection to the admission of the results of the blood draw would have only stood to help the defense, and challenging the evidence could not have hurt the defense in any way.

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[80] *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (quoting *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995)).

[81] Gallagher appeared to either intentionally mislead the defense investigation or commit perjury, or both.

Second, the State also argued that Mr. Wright possessed the drugs that were strewn about someone else's car. The defense had nothing to gain by allowing the jury to hear Mr. Wright had traces of methamphetamine in his blood. Because the results of the blood draw were admitted, the jury was allowed to infer that Mr. Wright was guilty of possession due to his general criminal disposition, and more specifically, his propensity to use illegal drugs.

b) A foundation objection would have been sustained

Before introducing blood results, the State must present prima facie evidence that the "chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results."[82] Prima facie evidence is that which supports a logical and reasonable inference of the facts sought to be proven.[83]

"[A] blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC [Washington Administrative Code] requirements."[84] The relevant WAC requires blood samples to be "preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the

[82] *State v. Wilbur-Bobb*, 134 Wn. App. 627, 630, 141 P.3d 665 (2006).
[83] RCW 46.61.506(4)(b).
[84] *State v. Hultenschmidt*, 125 Wn. App. 259, 265, 102 P.3d 192 (2005).

alcohol concentration."[85] These enzymes and anticoagulants prevent clotting and preserve the alcohol concentration.[86]

This requirement is mandatory.[87] Only after the State makes a prima facie showing of these requirements may the jury determine the weight to be attached to the evidence.[88]

To lay proper foundation, the State is required to present evidence that *both* the anticoagulant and the enzyme poison are present inside the blood vial. In *Bosio*, the State introduced testimony that the chemical powder was in the vial.[89] The State laid sufficient foundation that the anticoagulant was present because, at trial, the blood was not coagulated. However, the State did not demonstrate the presence of the enzyme poison.[90] This omission resulted in the reversal of the vehicular assault conviction.[91] Moreover, in *Hultenschmidt*, the State failed to introduce evidence that the enzyme poison was present in the blood vial.[92] The State argued other evidence was sufficient to show the blood test's reliability, but because it failed to actually prove that the enzyme poison was present

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[85] WAC 448-14-020(3)(b).
[86] *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991).
[87] *State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001).
[88] *State v. Brown*, 145 Wn. App. 62, 69-70, 184 P.3d 1284 (2008).
[89] *Bosio*, 107 Wn. App. at 468.
[90] *Id.*
[91] *Id.*
[92] *Hultenschmidt*, 125 Wn. App. at 266.

in the vials, the appellate court was compelled yet again to reverse and order a new trial.[93]

In this case, the State did not provide any evidence that the blood vials contained the necessary anticoagulant or the enzyme poison. The State did not bring in the actual blood vials; instead, the toxicologist brought in a picture of the vials. At no point in the toxicologist's testimony was the enzyme poison even mentioned.

The state failed to present a prima facie case that the blood vials followed the requirements set forth in the WACs. Without the proper prima facie case, the State did not lay the proper foundation. Therefore, the trial court would have been compelled to sustain a foundation objection.

2. Defense Counsel's Failure to Object to Admission of the Blood Draw Evidence Prejudiced Mr. Wright.

Prejudice occurs when there is "a reasonable probability that, but for defense counsel's unreasonable errors, the result of the proceeding[s] would have been different."[94]

A defendant is prejudiced when trial counsel fails to object to the admission of evidence. In *Saunders*, the defendant was charged with possession when a wallet containing heroin was found in a borrowed car

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[93] *Id.*
[94] *Strickland*, 466 U.S. at 694.

he was driving.[95] On direct examination, defense counsel introduced evidence of defendant's prior drug convictions.[96] The court found the introduction of the defendant's prior drug convictions to be prejudicial because evidence against the defendant was not overwhelming.[97]

Similarly, in this case, the State did not produce overwhelming evidence of vehicular homicide. Other than the blood draw, the State produced no evidence that Mr. Wright was intoxicated. The State's only evidence for the other prongs (recklessness/indifference to others) was the testimony of a driver who observed Mr. Wright's questionable driving before the accident.

Because the State's evidence was remarkably weak, the presence of methamphetamine in the blood test was crucial. Without it, the State would have been precluded from even arguing that Mr. Wright was intoxicated that the time of the accident. Without this argument, it would have been impossible for the State to connect the cause of the accident to intoxication. The State would have had to convince the jury that a driver who strayed outside the lane was culpable for vehicular homicide.

Due to the importance of the small amount of methamphetamine in Mr. Wright's blood to the State's argument, the State would have

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[95] *Saunders*, 91 Wn. App. at 577.
[96] *Saunders*, 91 Wn. App. at 578.
[97] *Saunders*, 91 Wn. App. at 580.

struggled to make a coherent argument implicating Mr. Wright without evidence of the blood draw. Therefore, the result of the trial unquestionably would have different had defense counsel properly objected to the admittance of the blood draw.

C. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT MR. WRIGHT POSSESSED THE TRACE AMOUNT OF HEROIN THAT WAS FOUND INSIDE THE VEHICLE.

In analyzing a challenge to the sufficiency of the evidence, the court's inquiry is whether any rational jury could have found Mr. Wright guilty beyond a reasonable doubt.[98] When the defendant challenges the sufficiency of the evidence, the court must review the evidence in the light most favorable to the State.[99] But, if the evidence fails to establish the facts required to prove any element, reversal is required.[100]

It is unlawful for any person to possess a controlled substance.[101] Possession may be actual or constructive.[102] Actual possession requires the drugs to be within the personal custody of the defendant.[103] Because there was no evidence that Mr. Wright had drugs within his personal

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[98] *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).
[99] *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[100] *Id*
[101] RCW 69.50.4013.
[102] *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).
[103] *Id.*

custody, his conviction may only be upheld if there was sufficient evidence that he had constructive possession of the drugs.

1. Constructive Possession Requires More Than Mere Proximity to the Drugs

Constructive possession requires that a defendant had dominion and control over the drugs in question.[104] Whether a person had dominion and control is determined by the various indicia of dominion and control, their cumulative effect, and the totality of the circumstances.[105] While control need not be exclusive, mere proximity to the drugs is insufficient to prove constructive possession.[106] Similarly, a momentary handling or temporary passing of the drugs is insufficient to establish dominion and control.[107] Moreover, the fact of temporary residence, personal possessions on the premises, and knowledge of the presence of the drug without more is insufficient to show the dominion and control necessary to establish constructive possession.[108]

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[104] *See Callahan*, 77 Wn.2d 27; *State v. Chavez*, 138 Wn. App. 29, 156 P.3d 246 (2007).
[105] *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977).
[106] *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968); *State v. Wheatley*, 10 Wn. App. 777, 519 P.2d 1001 (1974); *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983).
[107] *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (Defendant's fingerprints on a jar containing drugs was insufficient to find constructive possession when he had been a passenger in a stolen vehicle).
[108] *State v. Davis*, 16 Wn. App. 657, 558 P.2d 263 (1977); *see also State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (the court found the evidence insufficient to establish dominion and control where a passenger in a vehicle left fingerprints on a jar containing contraband).

In *Callahan*, the defendant was found on a friend's houseboat in close proximity to various drugs.[109] He was convicted of illegally possessing dangerous drugs. The record indicated that the defendant had been staying on the houseboat for two to three days, and a number of the defendant's possessions were recovered from the premises, including a pair of scales that could have been used to weigh drugs. The defendant also admitted to having handled the drugs earlier in the day. However, there was no evidence that the defendant had participated in paying rent or had made the boat his permanent residence. The Court reversed, reasoning that that the facts were insufficient to support a possession charge under both the actual and constructive theories of possession.[110]

Here, Mr. Wright had been driving his girlfriend's car and was found in close proximity to the heroine in the center console. There was no evidence that Mr. Wright had ever handled the drugs, and blood tests showed no traces of heroin in Mr. Wright's system. Similar to the defendant in *Callahan*, Mr. Wright was not the owner of the premises on which the drugs were found, and as such, the State was required to prove more than mere proximity to the drugs in order to establish constructive possession. In this case, the state failed to meet its burden.

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[109] *Callahan*, 77 Wn.2d at 28.
[110] *Id.*

2. DOMINION AND CONTROL OF THE PREMISES, EVEN WHEN COMBINED WITH KNOWLEDGE OF THE DRUG'S PRESENCE WAS INSUFFICIENT TO PROVE CONSTRUCTIVE POSSESSION

Even if the fact that Mr. Wright drove (but did not own) the vehicle in which the heroin was found was sufficient to establish dominion and control over the vehicle, the evidence was still insufficient to prove constructive possession of the heroin.

"It is not a crime to have dominion and control over the premises where the substance is found."[111] Rather, dominion and control of *the premises* is only one circumstance bearing on whether the defendant had dominion and control of *the drugs*.[112] Moreover, dominion and control of the premises does not create an inference that the defendant had dominion and control over the drugs found on the premises.[113] Dominion and control of the premises, even when combined with knowledge cannot be sufficient for a finding of constructive possession. [114]

In *Shumaker*, Charles Shumaker was arrested for driving without a license after being involved in a car accident. Aimee Mielke was sitting in the passenger's seat. Officers searched the car incident to the arrest. The police found a backpack in the passenger side of the car containing 185 grams of marijuana, a digital scale, used marijuana pipes, packaging

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[111] *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214, 1216 (2007).
[112] *Id.*
[113] *Id.* at 331.
[114] *Id.*

materials, and a list of names and numbers. Shumaker admitted that he owned a smaller amount of marijuana that was later found in the trunk. Shumaker was charged and convicted of possession of marijuana with intent to manufacture or deliver. The Court reversed the conviction, holding that a jury instruction which allowed a jury to convict solely on the basis of dominion and control of the premises was improper.

Here, the facts are almost identical to those in *Shumaker.* Shumaker (1) was the driver and owner of the vehicle in which the drugs were found, (2) knew there were drugs in the car, and (3) was found in close proximity to the drugs. Here, the State only proved that Mr. Wright (1) drove the vehicle, (2) was generally aware of the presence of drugs in the vehicle, and (3) was found in close proximity to the drugs. Although Mr. Wright does not challenge the validity of his jury instructions, the *Shumaker* court made clear that "the State must show dominion and control over *the substance* for a proper conviction under constructive possession."[115]

Even accepting that the State proved (1) dominion and control of the vehicle, (2) proximity to the drugs, and (3) knowledge of the drugs' presence, taken together, the facts do not rise to a level of sufficiency required to convict a defendant of constructive possession.

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[115] *Id.* (emphasis added).

Based upon all of the evidence presented at Mr. Wright's trial, the only grounds upon which the jury could have determined that Mr. Wright possessed the heroin inside of his girlfriend's car were that he was driving the car and that he was in close proximity to the drugs. The *Shumaker* decision makes it apparent that such a finding was impermissible.

In order for *Shumaker* to carry any significance, the State must prove more than dominion and control over the vehicle and proximity to carry its burden. Here, it failed to do so, and as such Mr. Wright's conviction for possession of a controlled substance should be dismissed.

D. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR USE OF DRUG PARAPHERNALIA BECAUSE POSSESSION IS INSUFFICIENT TO PROVE USE.

The mere possession of drug paraphernalia—such as a glass pipe or a cocaine baggie—is not a crime in Washington.[116] Only the *use* of such paraphernalia constitutes a criminal act.[117] To prove the crime of "possession of drug paraphernalia," the State had to prove not only that Mr. Wright possessed the drug paraphernalia found in the car, but also that he used it in a drug-related activity.[118]

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[116] See RCW 69.50.412(1); *State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539 (2002); *State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992).
[117] *Id.*
[118] RCW 69.50.412(1); *State v. George*, 146 Wn. App. 906, 912, 193 P.3d 693 (2008).

In *State v. George*, the vehicle in which the defendant was riding was stopped for speeding.[119] The officer smelled an odor of marijuana coming from the vehicle, searched the vehicle and found a glass pipe on the floor next to where the front passenger (George) was sitting. The residue in the pipe later tested positive for marijuana. The defendant was arrested and charged with possession of a controlled substance and use of drug paraphernalia. A jury found him guilty of both counts, but Division I reversed both convictions and dismissed them for insufficient evidence.[120] In its finding, the Court reasoned that there was simply no evidence that proved anything more than George's mere proximity to the marijuana found in the car.[121]

The arresting officer testified that he smelled recently burnt marijuana.[122] But no evidence, beyond George's presence in the vehicle, connected George to the pipe or the smell of marijuana. George had no drugs on his person. Nor did George have other drug paraphernalia—such as matches or a lighter—on him when he was searched incident to arrest. Police also noticed no physical signs that George had recently used marijuana, such as dilated pupils or smelling like burnt marijuana. As the

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[119] *Id.*
[120] *Id.*
[121] *Id.* at 922-23.
[122] "Based on the strong odor of it, that it was fairly recent it could have been there days but it had been used before days had gone by. … As strong as it was to me, I would have been really surprised if it would have been more than three hours."

court of appeals correctly recognized, these innocuous facts do not lead to a reasonable "inference that George had been using the pipe" nor did it support the State's speculative theory that George had possessed it "and then tried to hide it by putting it at his feet" when the car was pulled over.[123]

Similarly here, the evidence proves nothing more than what is always insufficient to prove either use or possession of a controlled substance: Mr. Wright's mere proximity to drugs and drug paraphernalia. Just as in *George*, no evidence suggested that Mr. Wright possessed the drugs

Mr. Wright had no drugs on his person. Nor did he have other drug paraphernalia on his person—such as matches or a lighter to heat the spoon and use the heroin—when he was arrested. Mr. Wright's fingerprints weren't found on the lighter or the spoon.

And no evidence suggested that Wright had recently used the drug paraphernalia to ingest heroin. The needles found at the scene were capped and unused. And even if they were used, the only evidence in the record points to the passenger—not Mr. Wright—as its user. Gallagher, the State's own Drug Recognition Expert testified that Mr. Wright's pulse, blood pressure, body temperature, and pupil size were all normal. The

[123] *Id.* at 922-23.

passenger, on the other hand, had track marks all over her arm and was clearly a heavy heroin user. Yet, Mr. Wright had no track marks and a clean toxicology screen for heroin use.

Finally, as in *George*, just because Mr. Wright was in the car, the jury could not conclude, without more information, that Mr. Wright possessed the heroin or the paraphernalia inside that car. In both cases, we do not know how long the defendant had been in the car, nor do we know who inside that car had possessed and used the drugs inside of it.[124]

Thus, just as in *George*, these innocuous facts do not lead to a reasonable "inference that [Mr. Wright] had been using the" heroin paraphernalia in the car. Likewise, the evidence did not support the State's speculative theory that Mr. Wright had possessed that paraphernalia or the heroin "and then tried to hide it" before police arrived. In the end, none of the evidence admitted in Mr. Wright's trial, would allow a reasonable jury to infer that Mr. Wright possessed or used the drugs or drug paraphernalia in the car and at the accident scene.

E. Mr. Wright's Conviction for Vehicular Homicide is not Supported by Sufficient Evidence.

Mr. Wright's conviction for vehicular homicide is unsupported by the evidence. In analyzing a challenge to the sufficiency of the evidence, the court's inquiry is whether any rational jury could have found Mr.

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[124] *Id.*

Wright guilty beyond a reasonable doubt.[125] When the defendant challenges the sufficiency of the evidence, the court must review the evidence in the light most favorable to the State.[126] But, if the evidence fails to establish the facts required to prove any element, reversal is required.[127]

Under the vehicular homicide statute, the State must prove that the defendant was under the influence of intoxicating liquor or any drug, driving in a reckless manner, or driving with disregard for the safety of others.[128] Here, the state failed to prove any of these prongs.

First, no evidence showed Mr. Wright was under the influence of any drug. The State's DRE admitted in a pretrial interview and on direction that Mr. Wright was not intoxicated after the accident. None of the responding police officers testified that Mr. Wright appeared intoxicated. Although Mr. Wright's blood contained a small amount of methamphetamine, it was consistent with a therapeutic does. In any event, the results of the blood test should not have been admitted due to lack of foundation.

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[125] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).
[126] *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[127] *Id*
[128] RCW 46.61.520.

Furthermore, the State's only evidence suggesting Mr. Wright was driving in a reckless manner or with disregard for the safety of others came from a witness who was driving down the same freeway before the collision. This witness testified that Mr. Wright was swerving and speeding. However, this witness primarily observed Mr. Wright's driving through his side rear view mirrors—the witness's truck did not have a back window. And the witness did not claim that Mr. Wright was outside his lane when the SUV struck the school bus.

Simply put, failing to stay inside a lane during the time before an accident is not enough for a reasonable jury to conclude beyond a reasonable doubt that a defendant is guilty of vehicular homicide. Therefore, because the State failed to produce sufficient evidence to support the verdict, Mr. Wright respectfully requests this court to reverse his conviction.

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IV. REQUEST FOR RELIEF

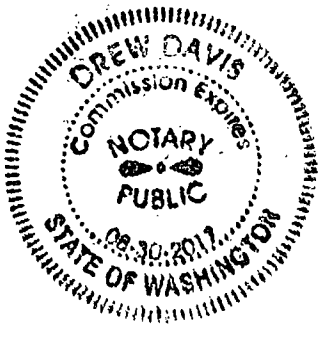
For the reasons set forth above, Mr. Wright respectfully requests that this Court grant his personal restraint petition.

V. OATH

I am the attorney for the petitioner, I have prepared the petition, I know the petition's contents, and believe the petition's contents to be true.

DATED this 16 day of July, 2014.

Respectfully submitted,



Mitch Harrison, WSBA #43040

Attorney for Petitioner Nathen Wright

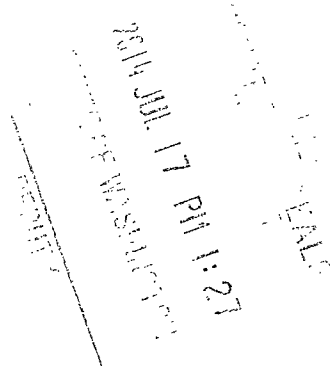
SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 16th day of July, 2014.

Notary Public for Washington

My Commission Expires: 08-30-2017

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:



Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Mason County Prosecutors Office
411 North 5th Street #A
Shelton, WA 98584

Mr. Nathen Wright #308603
Cedar Creek Corrections Ctr.
12200 Bordeaux Road
PO Box 37
Littlerock, WA 98556-0037

7/16/14
Date

Milena Hill
Milena Hill